KPMG
cutting through complexity

General tax update for financial institutions in Asia Pacific

Regional co-ordinator and editor - John Timpany, KPMG China

Issue 49, June 2014

This publication continues our series of updates on tax issues affecting Financial Institutions in the Asia Pacific region.

The issues highlighted in the OECD BEP's project around Transparency and prevention of base erosion through tightening thin capitalisation rules, restrictions on treaty benefits and transfer pricing are reoccurring themes across much of the recent developments in the region. We expect this to continue for the foreseeable future.

Highlights

- Australian Treasury released an Exposure Draft on thin capitalisation reforms
- Board of Taxation released a discussion paper after debt / equity tax rules review
- Australia and US signed FATCA intergovernmental agreement

- SAT clarifies "beneficial ownership" under entrusted investment arrangement

- Hong Kong and USA signed a Tax Information Exchange Agreement
- "Through train" back on track

- Direct Taxes Code for public discussion

- Newly revised 'Negative Investment list'

- Korea-USA agreement of automatic exchange of tax information
- Implementation of Capital Gain Tax on financial derivatives

- Securities Commission issued guidelines on Venture Capital Tax Incentives

- New Double Taxation Agreements signed with Guernsey and Luxembourg

Australia

Back to top ▲

Legislative developments

Exposure Draft released on third element of investment manager regime
On 31 January 2014, the Treasury released a third Exposure Draft (ED) of legislation relating to the Government's proposal to introduce the third element of the Investment Manager Regime (IMR). Under this legislation, the gains of qualifying foreign funds from the disposal of certain financial arrangements will be exempt from Australian tax.

Exposure Draft legislation released on thin capitalisation reforms
On 8 May 2014, the Australian Treasury released an ED of legislation designed to tighten the thin capitalisation rules and the current exemption for foreign non-portfolio dividends.

The proposed changes are to apply from income years commencing on or after 1 July 2014 and include:

- Reduction in the safe harbor debt ratio from 75% (3:1 debt to equity) to 60% (1.5:1) for general taxpayers, while the ratio for financial institutions will reduce to15:1 from 20:1;
- Worldwide gearing test ratio for outbound investment will be reduced from 120% to 100%;
- Worldwide gearing test will be extended to inbound investors;
- The de minimis threshold under which the thin capitalisation rules do not apply will be increased from $250,000 to $2 million in debt deductions per year; and
- Rules pertaining to authorized deposit-taking institutions (ADIs) will also change.

Dividend Washing

Dividend washing occurs when shareholders seek to claim two sets of franking credits on what is effectively the same parcel of shares (utilizing a special market run by the ASX knows as the 'cum dividend' market).

Treasury released draft legislation for public comment on 24 March 2014, which introduces a targeted integrity measure to eliminate cases where a taxpayer can obtain multiple franking credits from what is economically a single parcel of shares. The new measures are proposed to apply from 1 July 2013 and:

- Operate where an entity, or a connected entity, disposes of a membership interest without the right to the dividend (ex-dividend parcel) and then acquires a substantially identical membership interest with the right to the dividend (cum-dividend parcel); and
- When activated, the entity is consequently denied the additional franking credit on the distribution on the membership interest with the right to the dividend (cum-dividend parcel).

The new measures should not affect small retail investors, as it only applies to investors with a franking credit tax offset entitlement in excess of $5,000. In addition, we note that typically only those investors with a marginal tax rate below the 30% corporate tax rate would have derived a post-tax benefit from dividend washing trades prior to the introduction of these measures.

Removal of CGT discount for foreign residents

The Australian Government has now enacted legislation which removes the 50% capital gains

tax (CGT) discount concession for foreign residents, for the portion of the discounted capital gain that accrues after 8 May 2012.

Legislative amendments to remove the 50% CGT discount concession for foreign residents were originally announced on 8 May 2012 and apply retrospectively to the disposal of CGT assets after that date.

Cases

Decision - Blank v Commissioner of Taxation

The Federal Court on 21 February 2014 held that a resident taxpayer, who was entitled to a deferred equity based payment over 5 years of US$160m following his retirement, was assessable on the payment as ordinary income in the income year in which the right to the payment arose. The amounts were ordinary income on the basis that they were a reward for his services as an employee.

The case is interesting because it also considers in some detail the definition of 'financial arrangement' in the context of the debt/equity rules. It establishes a set of 'common indicia' to consider when determining whether a capital raising constitutes the raising of finance under a 'financial arrangement', namely: the intention of the issuer, the size and nature of the issuer's business, its other debt obligations and the capital raised under the scheme, and the existence and extent of any non-financing purposes of the scheme. The conclusion to be drawn from this is that the definition of 'financial arrangement' may be narrower than first thought.

Taxation rulings and determinations

Transfer pricing reconstruction provisions and documentation requirements

The Australian Taxation Office (ATO) has released two new Draft Rulings which provide the Commissioner's view on the application of the reconstruction provisions and documentation requirements in respect of the transfer pricing rules.

TR 2014/D3 explains the ATO's views as to the application of the 'basic rule' for considering whether a transfer pricing (TP) benefit may exist, and how the exclusions therein will be applied to determine situations where the Commissioner is empowered to disregard the actual commercial or financial relations that exist, and reconstruct the arrangement in accordance with the form and substance of these relations.

TR 2014/D4 sets out the ATO's views, regarding how and when TP documentation should be prepared and what needs to be considered and contained within the documentation to meet the 'reasonably arguable position' (RAP) standard to mitigate the impact of penalties.

Complementing this ruling are ATO Practice Statements explaining the process for compiling TP documentation (PS LA 3673), and the process around determining liability to and assessment and/or remission of such penalties (PS LA 3672).

Foreign income tax offsets

On 26 March 2014, the Commissioner released TR 2014/D2, which is concerned with the application of the foreign income tax offset limit to an Australian resident taxpayer deriving gains and losses from foreign currency hedging transactions in respect of a portfolio of assets.

The ruling highlights that in determining the source of foreign currency hedging gains the Commissioner will place significant weight on the place where the foreign currency hedging transactions are formed (not where the Master ISDA is formed).

Thin capitalisation exemption for special purpose entities & securitisation vehicles

On 12 March 2014 the ATO released Draft Tax Determination TD 2014/D8. The draft TD is intended to clarify the scope of the exemption from the thin capitalisation rules as they relate to special purpose entities (particularly those established under a securitised licence structure used

in some Public Private Partnerships (PPPs)).

Other developments

Tax compliance, third party reporting, pre-filling and data matching

On 7 February 2014, Treasury released a discussion paper outlining proposed measures aimed at improving tax compliance through third party reporting to the ATO under a new reporting regime. The measures are scheduled to commence from 1 July 2014 and, if enacted as proposed, will have a significant impact on banks, merchant payment facilities and essentially any institution that issues credit cards. It could also have implications for the funds management industry.

The measures are also intended to improve tax compliance for certain taxpayers by enabling the pre-filling of non-complex tax returns.

The discussion paper considers the establishment of new reporting systems for:

- Sales through merchant debit and credit services;
- Sales of real property;
- Sales of shares (including options and warrants) and units in managed funds; and
- Taxable government grants and specified other government payments.

Initially the ATO would seek to receive annual reports and then progressively move towards quarterly, monthly or real time reporting.

This measure is currently scheduled to commence from 1 July 2014.

Board of Taxation discussion paper: Debt / equity tax rules

On 25 March 2014, Australia's Board of Taxation (BoT) released a discussion paper following its review of the current debt / equity tax characterisation rules.

The review is both a post-implementation analysis of the debt/equity rules and a review as to whether there are any inconsistencies between Australia's and other jurisdictions' debt and equity rules that could give rise to tax arbitrage opportunities in cross-border transactions.

The review listed a number of problems with the debt / equity rules, including:

- The precise meaning of 'effectively non contingent obligation';
- Ineffective interaction with other tax rules;
- The wide scoping power of the ATO to re-characterise a debt interest as an equity interest (resulting in denial of the tax deduction) under the specific integrity measure in the debt/equity rules.

The paper also outlines a number of practical issues that have arisen in the operation and administration of the debt/equity rules as a result of the above points.

Australia and US sign FATCA intergovernmental agreement

The Foreign Account Tax Compliance Act (FATCA) was enacted by the United States Congress in March 2010 to improve compliance with US tax laws by imposing certain due diligence and reporting obligations on foreign (non-US) financial institutions, including Australian institutions.

On 28 April 2014, Australia and the US signed an intergovernmental agreement (IGA) to assist in the facilitation of FATCA for Australian financial institutions. A key objective of the intergovernmental agreement is to support Australian compliance with FATCA in a way that reduces its overall burden on Australian business (e.g. by reporting the information to the Australian Taxation Office (ATO) under the existing Australia–US tax treaty arrangements).

Exposure Draft legislation has been released to give effect to Australia's obligations under the IGA.

Under FATCA:

- A broad range of Australian financial institutions will be affected, including banks, some building societies and credit unions, specified life insurance companies, investment funds, custodial institutions and some brokers – these financial institutions will be required to register with the IRS.
- From 1 July 2014, the affected financial institutions will review customer accounts to determine whether they are reportable accounts (US citizens or US tax residents) under the IGA.
- The institutions will report to the ATO the required account information for the 2014 calendar year.
- The information reported to the ATO will then be passed on to the IRS.

The IGA will essentially operate under the existing reciprocal tax information-sharing arrangements between the IRS and the ATO.

Back to top ▲

China

Back to top ▲

Taxation rulings and determinations

Further clarification of beneficial ownership under an "entrusted investment" arrangement

China's State Administration of Taxation ("SAT") issued Announcement [2014] No.24 ("Announcement 24") on 21 April 2014 to clarify the determination of "beneficial owner" under an "entrusted investment arrangement" for the purposes of applying for tax treaty benefits for dividends and interest income. Announcement 24 takes effect from 1 June 2014.

According to the Announcement 24, an "entrusted investment" arrangement refers to equity or debt investments made by non- PRC residents with their own capital through a licensed or approved overseas financial institution which separately manage investors' capital in return for a fee or commission. As the non PRC resident investors would obtain the investment income and bear the relevant investment risks, they are permitted under the Announcement 24 to apply for the applicable tax treaty relief as the beneficial owner of the relevant income, including dividend and interest. Announcement 24 specifically states that the beneficial ownership requirement does not apply to capital gains.

Specific conditions on the "entrusted investment" arrangement are prescribed under the Announcement 24, including that there should be no change in the nature of income derived from China and that ultimately received by the investor(s). Specific documentation needs to be submitted to the PRC tax authorities to support the tax treaty relief claim, including the relevant investment agreement between the non-resident investors, the investment manager, the custodian, the brokerage agent, etc.

Announcement 24 provides more detailed guidance to local tax authorities on how to determine the beneficial owner under entrusted investment arrangements. While Announcement 24 sets out the general principles for identifying the actual (ultimate) beneficial owner under an entrusted investment, it is expected that there would likely be some uncertainties in its application in practice.

Other developments

Newly negotiated Double Tax Agreements ("DTA") with France and Germany

China has re-negotiated DTAs with France and Germany on 26 November 2013 and 28 March 2014 respectively. These new DTAs and related Protocols, once ratified and entered into force, will replace the existing PRC-France and PRC-Germany DTAs and Protocols. If the ratification processes are completed in 2014, it is anticipated that these new DTAs could be effective from as early as 1 January 2015.

The key features of the new DTAs are summarised as follows:

	New PRC-France DTA	New PRC-Germany DTA
Dividend withholding tax ("WHT")	Reduction of dividend WHT rate from 10% to 5% for direct shareholdings of at least 25%	
Interest WHT	Interest WHT rate of 10% remains unchanged.	

Royalty WHT	Royalty WHT rate of 10% generally and 6% for use or right to use industrial, commercial or scientific equipment remains unchanged.	General royalty WHT rate of 10% remains the same but the WHT rate for use or right to use industrial, commercial or scientific equipment is reduced from 7% to 6%.
Capital gains	China can only tax capital gains when one of the following circumstances is met: 1 the gains are from the disposal of a company which was land-rich at any time during the 36-month period preceding such alienation; or 2 the recipient of gains has a participation directly or indirectly of at least 25% in the capital of that company at any time during the 12-month period preceding such alienation.	China can only tax capital gains when one of the following circumstances is met: 1 the gains are from the disposal of a land-rich company; or 2 the recipient of gains has a participation directly or indirectly of at least 25% in the capital of that company at any time during the 12-month period preceding such alienation. Regular trade of listed shares of a non-land-rich company on a recognised stock exchange are exempted from such source taxation as long as the total shares transferred in one year does not exceed 3% of the quoted shares.
Permanent establishment ("PE")	The time threshold for a building site, construction, assembly or installation project to constitute a PE is extended from 6 months to 12 months. The time threshold for constituting a service PE is changed from 6 months to "183 days" within any 12 month period. An agent who is devoting its activities wholly or almost wholly on behalf of a company would be considered to be a dependent agent of that company if the arm's length relationship is absent between the company and the company.	
Anti-treaty abuse provision	New anti-abuse provisions introduced to facilitate the application of domestic anti-avoidance measures	
Other	Special withholding tax treatment of sovereign wealth funds	Coverage of international transportation income elaborated

Back to top ▲

Hong Kong

Back to top ▲

Legislative developments

"Through train" back on track

Premier Li Keqiang recently announced in Hainan, during the Boao Forum for Asia, that two-way stock trading between the Shanghai and Hong Kong stock markets should be operational by October. The Hong Kong Securities and Futures Commission and the China Securities Regulatory Commission have, simultaneously, confirmed the development of a pilot programme for the establishment of mutual stock market access between Mainland China and Hong Kong that would see over 820 large and mid-cap stocks being eligible for cross-border trading. It is anticipated that both the Hong Kong and Shanghai exchanges will conclude an agreement soon to give effect to this.

Very few details have been made available to date. However, from what has been reported in the media, it would appear that through the "northbound trading link" Hong Kong and international investors will be able to buy and sell over 560 Shanghai listed stocks through Hong Kong brokers. These brokers will route the transactions through the Hong Kong bourse to the Shanghai exchange. Under the proposals, Hong Kong investors will be able to trade up to 300 billion yuan of A-shares subject to a maximum of 13 billion yuan per day. This annual quota is a little more than half the combined Qualified Foreign Institutional Investor (QFII) and Renminbi Qualified Foreign Institutional Investor (RQFII) quotas.

Similarly, the "southbound trading link" will enable mainland institutions and individuals to trade up to 266 Hong Kong listed stocks. The maximum total quota is 250 billion yuan of Hong Kong stocks (limited to 10.5 billion yuan per day) and the trades will be lodged with mainland brokers who will then place the orders with the Shanghai Stock Exchange, who will in turn pass them onto the Hong Kong Exchange. The southbound annual quota is less than 50% of the cumulative Qualified Domestic Institutional Investor (QDII) quota.

It is expected that the Through Train arrangement will, for the foreseeable future, complement (as opposed to replace) the existing QFII/RQFII and QDII schemes. This obviously offers something new to mainland Chinese investors who can now invest in economic sectors that were previously unavailable to them. It is also expected that that there will be an increase of retail investors investing in the mainland market.

The above quotas have no time frame and no announcement was made on whether the quota will be replenished if and when it runs out. It is possible the quotas will be lifted although the Hong Kong Financial Secretary has already cautioned investors not to expect an immediate uplift in quotas once the existing quota is filled.

The proposed scheme raises some questions regarding taxation and the implementation of double tax relief under the Hong Kong and China double tax agreement. It is likely that these will become more apparent the closer we get to implementation of the "through train".

In the 11 years that the QFII scheme and the more recent RQFII regime have been operating, there have been practical uncertainties regarding the China tax consequences of such investments. Although one can reasonably assume the tax consequences based on general tax principles, there have been operational discrepancies for foreign investors as the Chinese tax laws have neither rules governing the administration of taxation of QFIIs/RQFIIs in regard to

gains realized on the disposal of investments nor, conversely, a specific exemption for QFIIs and RQFIIs from China taxation. While the Chinese tax authorities were understood to be working on the issuance of detailed implementation rules for the collection of taxes on gains made by QFIIs on trading A-shares, these have not materialized and the tax position regarding both payment and collection remains uncertain.

Consequently important tax questions remain to be definitively clarified (which will also be relevant to the newly proposed investment regime), for example:

- Will the Hong Kong and foreign based investors be subject to withholding tax ("WHT") at 10% on A-share investment in China as regards capital gains, and if so, will tax treaty relief be available?
- If treaty protection is available for WHT on dividends and capital gains, how does a taxpayer claim treaty protection and what are the prerequisites to such a claim?
- How are capital gains to be calculated - on a trade by trade basis or on a pooling basis? What trade related expenses can be deducted from the gain (stamp duties etc)? Will the carry forward or back of trading losses be allowed?

A number of the above issues will not necessarily apply to the Through Train regime, but nevertheless they should be addressed and clarified by the Chinese tax authorities particularly as regards the more important issues surrounding capital gains, WHT and treaty benefits.

As the tax treatment of QFII/RQFII is still to be resolved, one would hope that when China finalizes this, by either promulgating laws and / or issuing regulations, the taxation of investors, particularly the mechanics of northbound trading link, will be addressed and certainty attained.

Other developments

Newly signed Tax Information Exchange Agreement by Hong Kong and the United States of America on 25 March 2014

Hong Kong has signed an agreement for the exchange of tax information with the United States of America (US). This is the first tax information exchange agreement (TIEA) signed by Hong Kong since the legal framework for entering into TIEAs was passed in July last year. TIEAs allow the Inland Revenue Department (IRD) to exchange information upon request made by another jurisdiction in relation to the assessment or enforcement of tax matters.

The Hong Kong government regards the signing of the TIEA with the US as a demonstration of its commitment to promoting tax transparency but has reiterated that its priority remains the expansion of its network of CDTAs with its major trading and investment partners.

The TIEA will only become effective after Hong Kong and the US have completed their respective legislative and ratification procedures to bring the TIEA into force. It is expected that the relevant legislation will be implemented as a matter of priority.

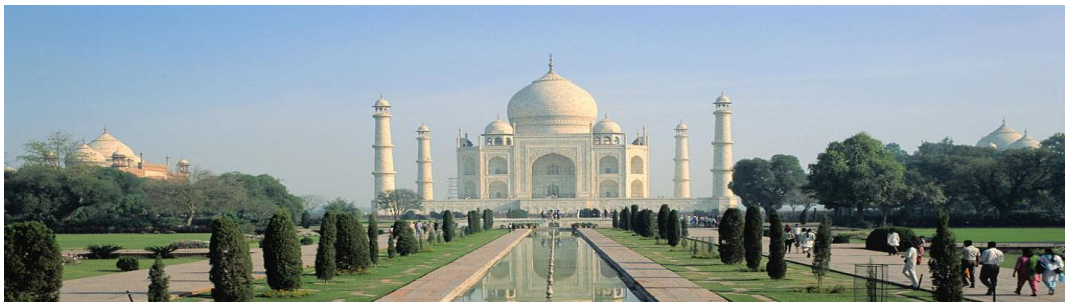
Details of the Hong Kong/US TIEA can be found on the IRD's website:
www.ird.gov.hk/eng/pdf/Agreement_US_HongKong.pdf

The TIEA with the US will also facilitate the exchange of tax information under a request made by the US under the US Foreign Account Tax Compliance Act (FATCA). FATCA, which comes into effect in July 2014.

In this regard, Hong Kong intends to enter into an intergovernmental agreement with the US which will enable Hong Kong financial institutions to comply with FATCA. Going forward it is anticipated that Hong Kong will be approached by more jurisdictions to conclude a TIEA.

Back to top ▲

India



Back to top ▲

Cases

Yama Finance Ltd. Vs. Assistant Commissioner of Income tax (I.T.A. No. 1658/2010)

Yama Finance Ltd. ('assessee') deals in shares. The assessee had also invested and sold mutual funds apart from shares and shown them in its investment account. Assessee held the mutual funds for about two years before eventually redeeming them and contended that the surplus from the sale of these mutual funds had to be treated as a long term capital gain on the following grounds:

- The assessee had invested in mutual funds and characterised them as investments and not as stock-in-trade in its books of account. This position apparently had been reported and accepted for the previous years; and
- The assessee held the mutual funds for about two years before eventually redeeming them.

The Assessing Officer ('AO') rejected the above contentions and held that the surplus from the sale of mutual funds had to be characterised as business income and not capital gains. The first appellate authority held the decision in favour of the assessee. The tax authorities appealed against the order of the first appellate authority to the second appellate authority who decided in their favour. Against the decision, the assessee appealed to the High Court.

The issue under consideration before the Delhi High Court ('High Court') was:

- Whether income earned on redemption of mutual funds is in the nature of business income or capital gains?

The High Court based its decision in the following facts:

- ''Volume, frequency, continuity and regularity" of the transactions- assessee had held the mutual funds for around two years.
- Maintenance of separate portfolios in the same set of books of account for ''investments'' and "business"- assessee had clearly demarcated the mutual funds as investment in the accounts.
- Use of borrowed funds- assessee had employed its own funds for purchase of mutual funds.

For the above reasons, the High Court held that the income earned on redemption of mutual funds is capital gains and not business income.

Radials International Vs. Assistant Commissioner of Income tax (I.T.A. No. 485/2012)

Radials International ('assessee') is a partnership firm, engaged in the business of providing technical, marketing and maintenance services for earth mover, aircraft and truck tyres. Assessee realized gains on sale of shares under the Portfolio Management Scheme (PMS) which were depicted as investment and not as stock in trade in the books of accounts. In response to the AO contention that the gains earned under the PMS is business income and not capital gains, the assessee submitted the following arguments:

- The shares were depicted as investments and not "stock in trade" in the accounts and hence the gains resulting from their sale were to be considered as capital gains;
- The investment was undertaken with its own surplus funds, and not borrowed funds;
- The holding period for a majority of the transactions was substantial;

- The relationship with the investment manager (the portfolio manager), as indicated by the agreements entered by PMS, was one of principal and agent; and

It was argued that since the transactions made by the PMS were delivery based, where delivery of the scripts was taken/given on purchase/sale of shares, the transactions were intended as investments and not adventure in the nature of trade.

The AO held that the motive of the transactions was earning of profit and not dividend, where the holding period was ranging from a few days to a few months. It was held that the income was business income earned by way of adventure in the nature of trade. The first and second appellate authority upheld the order of the AO in treating the profit made by the assessee on sale of equity shares under the PMS as business income and not as capital gains.

In appeal by the assessee, the issue under consideration before the Delhi High Court ('High Court') was:

- Whether the gains realized on sale of shares invested through a PMS is taxable as capital gains or as business income?

Based on the facts of the case, the High Court observed and held as follows:

- The tests laid down in Central Board of Direct Taxes Circular No. 4 of 2007 dated 15 June 2007, are to be referred in order to determine if the transaction is in nature of business income or capital gains;
- The intention of the assessee cannot be ascertained at the time of depositing money in the investment;
- The characterization of a transaction, i.e. as a portfolio management scheme or investment, itself is not determinative. It is settled law that nomenclature of a document or deed is not conclusive of what it seeks to achieve; the court has to consider all parts of it, and arrive at a finding in regard to its true effect;
- The PMS agreement in this case was a mere agreement of agency and cannot be used to infer any intention to make profit;
- The intention of an assessee must be inferred holistically, from the conduct of the assessee, the circumstances of the transactions, and not just from the seeming motive at the time of depositing the money;
- Along with the intention of the assessee, other crucial factors like the substantial nature of the transactions, frequency, volume etc. must be taken into account to evaluate whether the transactions are adventure in the nature of trade; and
- Even if only a small number of transactions resulted in a holding for a period longer than a year, the number becomes irrelevant when it is clear that a significant volume of shares was sold/purchased in those transactions.

For the above reasons, the High Court held that the gains on sale of shares under the PMS are capital gains and not business income.

Taxation rulings and determinations

Direct Taxes Code, 2013 ('DTC 2013')

Recently, the Finance Minister released the DTC 2013 for public discussion and comments. DTC 2013 has been revised after considering suggestions given by International Tax Standing Committee on Finance ('SCF'). As per news reports, out of 190 recommendations made by SCF, 153 are proposed to be accepted wholly or in part. Some of the key Corporate Tax recommendations accepted include the exemption to taxation of income from indirect transfer for shareholders having small shareholdings (up to 5 per cent), modification of the definition of place of effective management, introduction of broad based General Anti-avoidance Rules ('GAAR'), etc.

DTC's fate will depend on the policies and priorities of the new government. However, the DTC 2013 does provide the taxpayers with valuable insights into emerging trends in the policies and thought processes of the tax collectors in India.

Other developments

Double taxation avoidance agreement signed between India and Fiji

The Government of the Republic of India signed a Double Taxation Avoidance Agreement ('tax treaty') with the Government of Republic of Fiji on 30 January 2014 for the prevention of fiscal evasion with respect to taxes on income.

India notifies its revised tax treaty with Sri-Lanka

The Government of India has notified its revised tax treaty with Sri Lanka by virtue of Notification No. 23/2014, dated 28 March 2014. The revised tax treaty took effect from 1 April 2014. The key provisions of the tax treaty are summarised as follows:

Service PE

Under the revised tax treaty, the Service PE threshold has been reduced from 183 days to 90 days within any 12 months period.

Removal of 'Force of attraction Rule' dealing with Business Profits

The revised tax treaty has removed the 'force of attraction' rule present under the earlier tax treaty. This rule allows for taxation of indirect profits connected with a PE in the Source State. Accordingly, only the profits which are attributable to an enterprise PE in Sri Lanka or India may be taxed in that respective country.

Dividends

The tax rate on dividends is reduced to 7.5 per cent from the earlier rate of 15 per cent. However, this rate will be subject to review after three years from the date tax treaty enters into force. If it is not reviewed after 3 years, the rate at 7.5 per cent will continue to apply. This rate would apply only if beneficial owner of dividend is a resident.

As per the revised tax treaty, the income from mining shares and founders' shares shall not form part of dividend.

Fees for Technical Services ('FTS')

The revised tax treaty has included FTS along with royalty under Article 12. As per the revised tax treaty, consideration for managerial or technical or consultancy services, including provision of services of technical or other personnel would now be taxable at the rate of 10 per cent.

Capital Gains

- The revised tax treaty provides for taxability of gains from the alienation of movable property forming part of business property of a PE or gains from the alienation of movable property pertaining to a fixed base for the purpose of performing independent personal services, including gains from alienation of such PE (alone or with the whole enterprise) or of such fixed base. The earlier tax treaty provided for gains from alienation of immovable property.
- As per the revised tax treaty, gains from the alienation of shares of the capital stock of a company, the property which consists directly or indirectly principally of immovable property situated in the contracting state may get taxed in that state.
- Further, gains from alienation of shares, other than those mentioned in the above clause, in a company which is a resident of contracting state may be taxed in that state.

Limitation of Benefits ('LOB')

The revised tax treaty also provides certain qualifications and other conditions to obtain the benefit of the tax treaty.

The first set of APA was signed in one year since introduction of the APA programme

The APA program was introduced in India by the Finance Act, 2012 as a method of proactive dispute resolution and was operational from 1 July 2012. Although the introduction of APA was perceived as a positive step to curb the litigation which had greatly affected investor sentiment, many taxpayers were apprehensive of the practical challenges associated therewith. Amidst the prevailing uncertainty, Indian taxpayers filed over 140 APA applications in 2013 with KPMG in India handling over 40 of these applications.

India has signed its first batch of APAs with five Multinational Corporations (MNCs) fixing their tax liability in cross-border transactions over the APA term. Per press reports, these agreements

cover a range of international transactions, including interest payments, corporate guarantees, non-binding investment advisory services and contract manufacturing. These companies are engaged in different industrial sectors including pharmaceuticals, telecom, exploration and financial services. The Central Board of Direct Taxes has been able to conclude the first set of APAs within one year, against the internationally accepted norm of at least two years.

The APA program is an important step towards providing certainty to taxpayers. Generally, an APA is valid up to 5 years and the Income-tax Act, provides for renewal, revision or cancellation of an APA under certain circumstances. During the five year period, the taxpayer is required to file an annual report to confirm compliance with the terms of the APA. The tax authorities shall accordingly conduct a limited audit of the taxpayer to ensure compliance with the terms of the APA.

.

Back to top ▲

Indonesia

Back to top ▲

Other developments

Tax Treaty Update – Indonesia Suriname

The Director General of Taxation ('DGT') has issued Circular no. SE-59/PJ/2013 to stipulate the enforcement of the Double Tax Agreement ('DTA') between the Government of the Republic of Indonesia and the Government of the Republic of Suriname.

The Indonesia-Suriname 2003 DTA entered into force on 11 June 2013 and is effective for withholding tax levied on taxable income earned from Indonesia on or after 1 January 2014 and for any other income derived under fiscal years commencing on or after 1 January 2014.

Newly revised 'Negative Investment List'

The Negative Investment List as compiled by the Indonesia Investment Coordinating Board, ('BKPM') is issued under Indonesian Investment Law, Number 25 of 2007. It stipulates which sectors are open to foreign investment, business fields closed to foreign ownership in Indonesia as well as business fields which are conditionally open to foreign ownership indicating the percentage of foreign ownership permitted. It is regularly revised with the most recent revision, currently in focus, being stipulated under Presidential Regulation No. 39 2014, issued on 23 April 2014.

For financial institutions investing into Indonesia, it is worthwhile considering the foreign ownership restrictions and amendments legislated under the newly revised Negative Investment List in contrast with the prior Negative Investment list under Presidential Regulation No. 36 of 2010 to ascertain potential regulatory considerations.

For instance, under the business field 'Venture capital' pertaining to the finance sector, the maximum foreign capital ownership permitted has increased from 80% to 85%.

Back to top ▲

Korea

Back to top ▲

Other developments

Korea-United States agreement of automatic exchange of tax information

The MOSF has announced that, following recent meetings held 13-17 March in Washington D.C, South Korea and the United States have agreed to the automatic exchange of tax information. According to the agreement, tax authorities of both countries will collect and provide data from their financial institutions to the other tax authority from 2015 onwards. Details of reporting are as follows:

- Subject to Reporting:
  - i. US individual with financial accounts exceeding USD 50,000
  - ii. US corporation with financial accounts exceeding USD 250,000
- Financial information subject to reporting: interest, dividends, other income subject to withholding and account balance.
- Financial institutions subject to reporting: banks, financial investment companies, insurance companies, etc.
- Reporting period: every September beginning 2015 on financial data at the end of last year.

Implementation of Capital Gain Tax on financial derivatives

The Finance Committee has agreed on 22 April to the introduction of the capital gains tax on income from financial derivatives transactions. The legislation is still being drafted and details such as the rate and implementation date are not yet known.

Back to top ▲

Malaysia

Back to top ▲

Taxation rulings and determinations

Public rulings

The Malaysian Inland Revenue Board has recently issued, amongst others, the following Public Rulings:

- Public Ruling 1/2014: Withholding Tax on Special Classes of Income

  This Ruling explains the special classes of income that are chargeable to tax under Section 4A of the Income Tax Act, 1967 and replaces Public Ruling No. 4/2005 issued on 12 September 2005, Addendum to Public Ruling No. 4/2005 issued on 30 November 2007 and Second Addendum to Public Ruling No. 4/2005 issued on 4 January 2010.

- Public Ruling 2/2014: Taxation of Investors on Income from Foreign Fund Management Company

  This Ruling explains the tax treatment of income received by foreign and local investors that engage the services of a foreign funds management company.

The full text of the Public Rulings is available at *http://www.hasil.gov.my*.

Securities Commission ("SC") Guidelines

The SC has issued the following guidelines:

- Revised Venture Capital Tax Incentives Guidelines

  The Guidelines set out the types of incentives available for the venture capital industry, the qualifying criteria or requirements which must be fulfilled before a certification can be granted, and the procedures for application.

The full text of the guidelines is available at *www.sc.com.my*.

Back to top ▲

Mauritius

Back to top ▲

Other developments

Double Taxation Agreement (DTA)

Mauritius – Guernsey DTA

A DTA has been signed between Mauritius and The States of Guernsey. Some key features of the DTAA are set out below:

- Maximum tax rates applicable in the State of Source:
  - i. Dividend: Exempt
  - ii. Interest: Exempt
  - iii. Royalty: Exempt
- Duration to constitute permanent establishment:
  - i. Building site,etc: more than 12 months
  - ii. Furnishing of services: more than 9 months within any 12 months period

Mauritius – Luxembourg DTA

Amendments have been made to the existing 1995 Mauritius-Luxembourg DTA. The main changes include:

- Tax on fees of directors of companies have been deleted under Article 2-Taxes Covered;
- New paragraph added under Article 26 Mutual Agreement Procedure; and
- Article 27 Exchange of Information have been deleted and replaced by a new article governing exchange of information.

Back to top ▲

New Zealand

Back to top ▲

Legislative developments

Foreign Superannuation Tax Bill enacted

The Taxation (Annual Rates, Foreign Superannuation, and Remedial Matters) Act 2014 was enacted in February. The key change in the newly enacted legislation is to the taxation treatment of foreign superannuation schemes. Interests in foreign superannuation schemes will be taxable under a new set of rules, from 1 April 2014.

Parliamentary Select Committee recommends changes to Employee Benefits Tax Bill

In April, the Finance and Expenditure Select Committee of the New Zealand Parliament recommended a number of changes to taxation proposals contained in the Taxation (Annual Rates, Employee Allowances, and Remedial Matters) Bill (the "Bill") introduced in November 2013. This followed public consultation on the Bill.

The key proposals in the Bill include:

- Taxing employer provided benefits, such as accommodation allowances and benefits, unless specific exemptions or time limits apply.

  The Committee recommended a number of additional exemptions to make the rules more workable. KPMG is concerned that the need for these additional exemptions highlights issues with this reform generally.

- Changes to New Zealand's inbound thin capitalisation regime, which restricts interest deductions for non-resident owned and controlled New Zealand companies.

  The thin capitalisation changes in the Bill include extending the thin capitalisation restrictions to New Zealand companies that are 50% or more owned by a group of non-residents "acting together" (currently these rules apply when there is a single non-resident controlling shareholder). The Committee's changes were largely technical in nature. Disappointingly, KPMG's submissions on introducing consistent thin capitalisation rules for companies and tax transparent entities (e.g. limited partnerships), and for investment by single and multiple non-resident shareholders have not been addressed.

- A Framework for New Zealand to enter into inter-Governmental Agreements ("IGAs") to manage reporting obligations imposed on regional financial institutions under foreign law.

  The framework allows, but does not require, New Zealand to enter into such agreements. The immediate application of these rules is to the proposed IGA with the United States ("US") on Foreign Account Tax Compliance Act ("FATCA") requirements. The majority of submissions on the Bill were on the IGA/FATCA changes, with submitters particularly concerned about the impact on privacy and the US tax system's overreach. While noting the concerns raised, the Committee indicated that the US will implement FATCA regardless of the passage of the Bill and the consequences of non-compliance would be significant. KPMG agrees that the IGA framework is the best way for New Zealand to allow its financial institutions to comply with FATCA. A failure to comply carries a 30% US tax cost on not only the income but also on the capital invested. This will have a significant impact for New Zealand financial institutions and investors who use them to invest into the US.

The Bill is now awaiting enactment.

Taxation rulings and determinations

NZ Inland Revenue releases statement on tax residence

In March, the New Zealand Inland Revenue ("NZ IRD") released its long awaited interpretation statement on tax residence (this was previously released in draft form for consultation).

The key focus of the document is the residence tests for individuals, in particular the Permanent Place of Abode ("PPOA") test. The PPOA test measures enduring relationships to a particular country, in determining whether an individual is tax resident. The NZ IRD has concluded that availability of a dwelling (property) is a prerequisite for a PPOA. However, if this first step is met, other relationships and ties – i.e. family, economic, financial and social – must be considered.

The statement makes clear that determining an individual's New Zealand tax residency status involves considering the totality of the person's circumstances and the level of their enduring relationships with New Zealand, rather than relying on any one factor alone (such as time spent away from New Zealand). The analysis therefore needs to be a holistic exercise.

While the residence statement is intended to be a pragmatic guide, it will require judgement and may be difficult to apply in marginal cases. This is especially the case as decisions on residency status must often be made with hindsight – actions which are not planned but which occur after a person departs New Zealand will have an impact. Importantly, it remains to be seen how the NZ IRD will practically apply these principles to live residency cases. It is also unclear how existing tax positions on residence will be affected.

Other developments

New financial reporting requirements for companies

From 1 April 2014, the financial reporting requirements for businesses have changed.

The main impact is for non-"large" companies which, generally, no longer have to prepare audited general purpose financial statements. (These are New Zealand companies with total assets of less than NZ$60m or annual revenue of less than NZ$30m, or overseas companies and subsidiaries of overseas companies with assets of less than NZ$20m or revenues of less than NZ$10m.)

These companies will still have to file simplified accounts, for tax purposes, under minimum requirements prescribed by the NZ IRD. Those minimum requirements have now been set in the Tax Administration (Financial Statements) Order 2014.

Convention on Mutual Administrative Assistance in Tax Matters enters into force in New Zealand

The multilateral Convention on Mutual Administrative Assistance in Tax Matters became effective for New Zealand from 1 March 2014. The Convention, which was ratified by New Zealand in November 2013, allows the NZ IRD to request information from other tax authorities and seek their assistance in the collection of tax (and vice versa).

Double Tax Agreement between NZ and Papua New Guinea in force

A New Double Tax Agreement ("DTA") between New Zealand and Papua New Guinea is now in force. The withholding tax provisions of the new DTA apply from 1 March 2014. The other provisions of the DTA apply for income years beginning 1 April 2014 (for NZ) and 1 January 2015 (for PNG).

Back to top ▲

Philippines

Back to top ▲

Cases

Sal Oppenheim Jr & Cie Kommanditgesellschaft Auf Aktien vs. Commissioner, CTA EB Case No. 906, 3 March 2014 citing Deutsche Bank AG Manila Branch vs. CIR, G.R. No. 188550, 19 August 2013

The Supreme Court held that non-compliance with the prior application rule required by Revenue Memorandum Order No. 1-2000 should not operate to automatically divest entitlement to the tax relief as it would constitute a violation of the duty required in good faith in complying with a tax treaty and would impair the value of the tax treaty. At most, the application for tax treaty relief from the Bureau of Internal Revenue (BIR) should merely operate to confirm the entitlement of the taxpayer to the relief.

Taxation rulings and determinations

Revenue Memorandum Circular (RMC) No. 8-2014, 06 February 2014

RMC No. 8-2014 requires concerned withholding agents to require individuals and entities claiming tax exemption to present tax exemption certificate or ruling before payment of the related income.

Revenue Regulations (RR) No. 3-2014, 11 February 2014

A taxpayer shall be duly notified in writing by the Commissioner that a foreign tax authority is requesting for exchange of information held by financial institutions pursuant to an international convention or agreement on tax matters within sixty days from receipt of the said request.

However, if notification within this period will undermine the chances of success of the investigation conducted by the requesting foreign tax authority, the taxpayer shall be notified within six calendar months from receipt of the request.

Back to top ▲

Singapore

Back to top ▲

Taxation rulings and determinations

Treatment of Basel III Additional Tier 1 Instruments for Tax Purposes

Additional Tier 1 instruments are a new type of capital instrument under the Basel III global capital standards. Under Monetary Authority of Singapore ("MAS") Notice 637, Singapore-incorporated banks are required to meet the following requirements:-

- Minimum capital adequacy ratios that are 2% higher than the Basel III minimum requirements from 1 January 2015; and
- Basel III minimum capital adequacy requirements from 1 January 2013, two years ahead of the Basel Committee on Banking Supervision's 2015 timeline.

To provide tax certainty and maintain a level-playing field for Singapore-incorporated banks which issue Basel III Additional Tier 1 instruments, such instruments (other than shares), will be treated as debt for tax purposes. Hence, distributions on such instruments will be deductible for issuers and taxable in the hands of investors, subject to existing rules.

The tax treatment will apply to distributions accrued in the basis period for Year of Assessment 2015 and thereafter, in respect of such instruments issued by Singapore-incorporated banks (excluding their foreign branches) that are subject to MAS Notice 637.

Extending and refining Tax Incentive Schemes for qualifying funds

Funds managed by Singapore-based fund managers ("Qualifying Funds") currently enjoy the following tax concessions, subject to conditions:

- Tax exemption on specified income derived from designated investments; and
- Withholding tax exemption on interest and other qualifying payments made to all non-resident persons (excluding permanent establishments in Singapore).

Qualifying Funds comprise the following:

- Trust funds with resident trustee ("section 13C scheme");
- Trust funds with non-resident trustee and non-resident corporate funds ("section 13CA scheme");
- Resident corporate funds ("section 13R scheme"); and
- Enhanced-tier funds ("section 13X scheme").

The sections 13CA and 13R schemes impose conditions on investor ownership levels on the last day of the qualifying fund's basis period for the relevant YA. The investor ownership levels are computed based on the historical value of the qualifying fund's issued securities. The section 13X scheme does not impose conditions on investor ownership levels.

The tax exemption schemes for Qualifying Funds were due to expire on 31 March 2014. To anchor and continue to grow Singapore's asset management industry, the sections 13CA, 13R and 13X schemes will be extended for five years till 31 March 2019. The section 13C scheme was allowed to lapse after 31 March 2014.

The sections 13CA, 13R and 13X schemes will be refined as follows:

- From 1 April 2014, the section 13CA scheme will be expanded to include trust funds with resident trustees, which were previously covered under the section 13C scheme;

- From 1 April 2014, the investor ownership levels for the sections 13CA and 13R schemes will be computed based on the prevailing market value of the issued securities on the last day of the Qualifying Fund's basis period for the relevant year of assessment instead of the historical value; and
- The list of designated investments will be expanded to include loans to qualifying offshore trusts, interest in certain limited liability companies and bankers acceptance. This will apply to income derived on or after 21 February 2014 from such investments.

Other existing conditions of the sections 13CA, 13R and 13X schemes remain unchanged.

Refining the Designated Unit Trust ("DUT") Scheme

Specified income derived by a unit trust with the DUT status is not taxed at the trustee level, but is taxed upon distribution in the hands of certain investors. Qualifying foreign investors and individuals (unless such income is derived through a partnership in Singapore or is derived from the carrying on of a trade, business or profession) are exempted from tax on any distribution made by a DUT.

The DUT scheme is available to both retail unit trusts and certain other types of unit trusts, which are targeted at more sophisticated and institutional investors (non-retail unit trusts). A retail unit trust refers to a unit trust authorised under section 286 of the Securities and Futures Act and is open to the public for subscription, as well as a unit trust included under the CPF-Investment Scheme.

The DUT will be streamlined as follows:

- From 21 February 2014, the DUT scheme will be limited to unit trusts offered to retail investors. Non-retail unit trusts may consider other fund schemes;
- Existing non-retail unit trusts being granted the DUT scheme prior to 21 February 2014 may continue to enjoy the benefits provided under the scheme; and
- From 1 September 2014, unit trusts do not have to apply for the DUT scheme to enjoy the benefits of the scheme, subject to fulfilment of conditions.

A review date of 31 March 2019 will be legislated to ensure that the relevance of the scheme is periodically reviewed.

Recovery of Goods and Service Tax ("GST") for qualifying funds

GST-registered suppliers (e.g., Singapore fund manager) are required to charge GST on services supplied to funds belonging in Singapore. As a concession, under the GST remission scheme, Qualifying Funds are allowed to claim GST incurred on expenses at an annual fixed rate set by the Monetary Authority of Singapore (MAS), without having to register for GST.

The above GST remission scheme was due to expire on 31 March 2014. In line with the Singapore Government's efforts to further grow Singapore as a centre for fund management and administration, it has been announced during the Singapore Budget 2014 that the concession has been extended for 5 years till 31 March 2019.

The MAS has also recently released further details / updates in relation to the GST remission scheme. The relevant changes are as follows:

- With effect from 1 April 2014, the GST remission is extended to funds that satisfy the conditions for income tax concession as a section 13CA fund as at the last day of its preceding financial year.
- For section 13 CA funds which may be treated as "belonging in Singapore" and receive GST-chargeable services, the GST remission takes effect from 1 April 2014. As a transitional measure, section 13 CA funds with quarters ending on 30 April 2014 are to consolidate their first set of GST claims into the next statement.
- Clarification on belonging status of a fund.

  The MAS has made the following clarification on the belonging status of a fund:

  i. A fund, other than a trust fund, is treated as "belonging in Singapore" if it has:

     1) a business establishment ("BE") or some other fixed establishment ("FE") in Singapore

and no such establishment elsewhere;

2) no BE or FE in any country but it is incorporated in Singapore (in the case of a company) or registered in Singapore (in the case of a limited partnership); or

3) a BE or FE outside of Singapore and another BE or FE in Singapore, and the establishment at which the services are most directly used or to be used is in Singapore.

Following the above, a fund belongs in Singapore if the fund has an administration office with employees in Singapore. If a fund does not have any employee and administration office of its own in any country and wholly relies on a Singapore fund manager to carry on its business activities, the fund also belongs in Singapore.

ii. A fund in the form of a trust fund is treated as "belonging in Singapore" if its trustee belongs in Singapore.

iii. For funds that are not incorporated or registered in Singapore and non-residents for Singapore income tax purposes (e.g., section 13 CA and certain section 13X funds), it may have been unclear if such funds would be regarded as "belonging in Singapore" for GST purposes. As a concession, the IRAS will apply the rules on belonging status [as set out in (A) above] to such funds from 1 April 2014. GST-registered suppliers will need to accordingly charge GST supplied to such funds belonging in Singapore from 1 April 2014.

Back to top ▲

Sri Lanka

Back to top ▲

Legislative developments

VAT on Financial Services

Sri Lanka is a rare example of a VAT jurisdiction where VAT is levied on the Business of Provision of Financial services. The Statute provides for two formulas for computation of value addition i.e. attributable method and tax credit method. Effective from 1 January 2014 the value addition would be computed using only the attributable method. The tax credit method has been eliminated.

Nation Building Tax (NBT)

Subject to exceptions, service providers inter alia are liable for NBT on turnover. However until 31st December 2013 the provision of banking and financial services was not liable for NBT.

From 1 January 2014, NBT will be chargeable at 2% on banks and financial institutions. Turnover has been defined to mean value addition by the institution computed according to the attributable method for Financial VAT purposes.

Taxation rulings and determinations

The tax office has issued a direction to all the banks to ensure that a tax clearance be obtained by their customers prior to remittance of certain cross border payments such as royalty payments, computer software related payments, management services, payment for contractors etc.

Other developments

Sri Lankan Central Bank has initiated a scheme to consolidate the financial sector in order to establish financial stability. Under the scheme it is expected that 58 finance companies would be reduced to 20. In order to facilitate this scheme, tax incentives are to be provided for cost of acquisitions and cost of mergers.

Back to top ▲

Taiwan

Back to top ▲

Legislative developments

Proposed amendment to the Income Tax Act and Business Tax Act

On 13 March 2014, the Executive Yuan passed the draft amendments to the Income Tax Act ("ITA") and Value-added and Non-value-added Business Tax Act ("Business Tax Act"). The proposed amendments are currently undergoing the legislative process.

These draft amendments are largely similar to the previous short term tax regime reform proposal announced by the Ministry of Finance ("MOF"). The Executive Yuan has also scheduled the effective date of these amendments. Key aspects of the ITA draft amendments are summarized below:

- The imputation tax credit ratio on dividends will be halved：

  According to the draft amendments of the ITA, the imputation credit amount that resident individual shareholders are allowed to offset against their individual income tax liabilities will be halved. To equalize the tax burden, only halve of the 10% surtax previously paid on undistributed retained earnings, can be used by the foreign investors (i.e., foreign companies and non-resident individuals) as credits to offset against the withholding tax imposed on dividend distributions (Amendments of Article 66-4, Article 66-6 and Article 73-2 of the ITA).

- A non-small-scale profit-seeking enterprise ("PSE") organized as a sole proprietorship or a partnership will only be required to pay half the amount of tax payable after the deduction of unused withholding taxes as reported in its income tax returns.

  The draft amendments of the ITA will require non-small-scale PSEs to pay half the amount of tax payable as reported in its annual income tax returns, current final income tax return or income tax return for the liquidation period. The small-scale PSEs will not be required to file its annual income tax return nor calculate its income tax payable, as the amount of the foresaid income must be included and filed with the tax authority by the sole proprietor (for sole proprietorships) or the partners (for profit-seeking partnerships), and the consolidated individual income tax shall be levied in accordance with the ITA for consolidated individual income tax payable (Amendments of Article 14, Article 71, Article 75, Article 79, Article 108 and Article 110 of the ITA).

- The highest marginal rate of individual income tax will be increased to 45%:

  In addition to adjusting the tax brackets based on consumer price indices, there will be an additional bracket with the top marginal tax rate of 45% to be applied to high-income earners with a net income exceeding NTD 10 million (Amendments of Article 5 of the ITA).

- Special tax deductions increased by NTD 20,000 for income derived from salaries and for disabled persons:

  Currently, the special tax deductions for income derived from salaries and special deductions for disabled and/or handicapped persons is capped at NTD100, 000 per year, per person. Under the new draft amendments, the amount will be adjusted based on consumer price indices and increased to NTD108,000. By increasing the deduction amount by NTD 20,000 under the ITA amendments, the special tax deductions for income derived from salaries and

the disabled persons will be capped at NTD128,000 (Amendments of Article 17 of the ITA).

- The effective date of amendments of the ITA is 1 January 2015.

  The amendments to the ITA involving imputation tax credits on dividend distributions will come into force on 1 January 2015, and the remainder of the draft amendments to the ITA in connection with the calculation of individual income tax and non small-scale PSE income tax will come into force in 2015 (Amendment of Article 126 of the ITA). Key aspects of the Business Tax Act draft amendments are summarized as follows:

  i. The business tax rate levied on the core business revenues of banking and insurance industries will be amended to 5% (from 2%): From the effective date of the draft amendments of the Business Tax Act to 31 December 2024, the 2% business tax levied on the core business revenue of banking, insurance industries as well as other financial sectors will be appropriated for a special reserve for financial industries (Amendments of Article 11 of the Business Tax Act).

  ii. Where foreign financial institutions have no fixed place of business in Taiwan but sell services referred to in paragraph 1 of Article 11 of the Business Tax Act, the purchasers of the services shall compute the business tax and pay the business tax payable (Amendments of Article 36 of the Business Tax Act).

Back to top ▲

Vietnam

Back to top ▲

Legislative developments

Decree on restriction of payments by cash

On 31 December 2013, the Government issued Decree 222/2013/ND – CP prescribing the regulations on payments in cash, which prohibit cash payments in some specific cases such as :

- Trading securities in Stock Exchange and trading securities which are already registered/deposited at Vietnam Securities Depository ("VSD") other than via the transaction system of Stock Exchange;
- Capital contribution, capital transfers, and loans granted between non-credit institutions; and
- In addition, credit institutions, branches of foreign banks (collectively referred to as "CIs") should negotiate with clients on schedule of cash withdrawal and an advanced notice to CIs is required in usual case of a withdrawal of a large amount of cash

This Decree takes effect on 1 March 2014 and replaces Decree 161/2006/N-CP

Purchase of shares in Vietnamese credit institutions by foreign investors

On 3 January 2014, the Government has issued Decree 01/2014/ND-CP replacing Decree 69/2007/ND-CP providing guidance on the purchase of shares in Vietnamese CIs by foreign investors

Some notable points are:

- Under Decree 01, foreign investors could purchase the shares of Vietnamese CIs by:
  - i. Purchasing the shares of joint-stock CIs from existing shareholders;
  - ii. Purchasing the shares from the joint-stock CIs for its increase in charter capital or purchase treasury stocks of a joint-stock CIs; and
  - iii. Purchasing the share of CIs which are on process of conversion into joint-stock CIs.
- However, the ownership of foreign investor in CIs must be capped at statutory percentage of charter capital, details are as follows:

For foreign individuals	For foreign entity	Strategic foreign investors
5%	15%	20%

  Please note the capped 30% ownership of charter capital in commercial banks by foreign investors remains unchanged comparing to previous Decree 69

- Restriction on timing of transfer of shares in Vietnamese CIs has been provided, the strategic foreign investors are not allowed to transfer their shares in CIs within five years from the date of approval on being the strategic foreign investors of State Bank of Vietnam ("SBV"); and foreign investors who own more than 10% of charter capital are not allowed to transfer their shares in CIs within three years from the date of acquisition of such capital.

This Decree has taken effect from 20 February 2014.

Circular on conditions of debt restructuring

On 18 March 2014, Circular No. 09/2014/TT-NHNN ("Circular 09") was issued and provided amendments and supplement to a number of articles in Circular No. 02/2013/TT-NHNN regulating the classification of debt, establishment and levels of risk reserves and the use of reserves for dealing with risks during the operation of credit institutions and foreign bank branches ("CIs").

Some notable points are as follows:

- CIs are allowed to restructure the repayment schedule of a loan while preserving its original classification, provided that the following conditions are met:
  - i. The extension of credit with respect to the loan does not violate applicable regulations;
  - ii. The proposed restructuring of the debt repayment schedule conforms with the purpose of financing under the loan agreement;
  - iii. The borrower utilises the loan proceeds in compliance with the purpose of financing;
  - iv. If the borrower (a) fails to repay the loan principal and/or interest in accordance with the repayment schedule or (b) fails to repay, in full, the loan principal and interest within the loan term as agreed in the loan agreement, the borrower can propose a new and feasible repayment solution suitable for its business situation; and
  - v. The applicable CIs satisfy the SBV's regulations on prudential ratios in banking operations
- In addition to the above conditions, CIs must also satisfy, among others, the following requirements:
  - i. The applicable CIs must promulgate internal policies to supervise and ensure consistent implementation of debt restructuring in its network and avoid abusing debt restructuring practice which artificially inflates the quality of debt instrument;
  - ii. The applicable CIs must supervise and be responsible for the reason of debt restructuring of each loan;
  - iii. The applicable CIs are only able to restructure the repayment schedule and preserve debt classification in accordance with Article 10.3(a) for one time of each loan;
  - iv. Should the borrower still fails to repay the loan in accordance with the restructured schedule, the applicable CIs must re-classify such loan in accordance with the regulations of debt classification; and
  - v. The applicable CIs must send a report in the form attached to Appendix 01 of Circular 14 to the SBV within the first five days of each month or at any time upon the SBV's request.

Debt restructuring under Article 10.3(a) is permitted from 20 March 2014 to 31 March 2015 only.

This Circular takes effect from 20 March 2014.

Conditions for obtaining offshore-loans without Government guarantee

On 31 March 2014, SBV issued Circular 12/2014/TT-NHNN providing guidance on criteria for obtaining offshore-loans without Government guarantee, under which the below general aspects should be addressed and satisfied:

- Purpose of the loans;
- Loan agreements;
- Loans guarantee; and

- Loans interest.

This Circular takes effect from 15 May 2014 and replaces Chapter II Circular No. 09/2004/TT-HNN.

All foreign indirect investment in Vietnam must be made in VND

SBV has recently issued Circular No. 05/2014/TT-NHNN providing guidance on the use of foreign indirect investment ("FII") accounts by foreign investors in Vietnam ("Circular 05"). Circular No. 05 will only apply to foreign organizations and individuals that are non-residents and perform indirect investment activities in Vietnam, with notable principles as below:

- All foreign indirect investment in Vietnam by a foreign investor must be implemented through one FII bank account in Vietnam Dong which is duly created at an authorised bank in Vietnam;
- The balance in a FII's account must not be a deposit account transferred to credit institutions or foreign bank' branches; and
- In case where any FII of a foreign investor is changed into foreign direct invest ("FDI"), this foreign investor must apply for approval of such change. Then, the FII bank account may be closed and all amounts will be transferred to the FDI bank account in Vietnam Dong or it may be retained for other FII of this foreign investor.

In addition, Circular 05 also provides specifically the forms of foreign indirect investments.

The Circular 05 takes effect from 28 April 2014 and supersedes the Circular No. 03/2004/TT-NHNN of the SBV dated 25 May 2004.

Taxation rulings and determinations

Announcements issued by the Tax Department

On 24 April 2014, SBV has issued Official Letter No. 1118 ("OL1118") recommending Vietnamese CIs take prompt action to participate in the FATCA regime. Under OL1118, the following actions should be taken:

- Register for Global Intermediary Identification Number ("GIIN") to be FATCA compliant before 5 May 2014;
- Notify SBV of their GIIN after obtaining approval from U.S Internal Revenue Services ("IRS");
- Notify and obtain approval from SBV prior to transmitting information to IRS if at the time of reporting the Intergovernmental Agreement ("IGA") has not been yet signed; and
- Studying and updating FATCA requirements for better FATCA compliance.

This OL1118 also includes detailed procedures for GIIN registration in its Annex.

Other developments

In pertaining with OL1118, the Government of Vietnam has being prepared necessary documentation for negotiation with the Government of US regarding an IGA for implementation of FATCA.

Back to top ▲

Contact us

Australia
Jenny Clarke
+61 2 9335 7213
jeclarke@kpmg.com.au

China
Khoonming Ho
+86 (10) 8508 7082
khoonming.ho@kpmg.com

Hong Kong
John Timpany
++852 2143 8790
John.Timpany@kpmg.com

India
Naresh Makhijani
+91 22 3090 2120
nareshmakhijani@kpmg.com

Indonesia
Erlyn Tanudihardja
+62 21 570 4888
erlyn.tanudihardja@kpmg.co.id

Japan
James Dodds
+81 3 6229 8230
james.dodds@jp.kpmg.com

Korea
Kim Kyeong Mi
+82 2 2112 0919
kyeongmikim@kr.kpmg.com

Malaysia
Guanheng Ong
+ 60 3 7721 3388
guanhengong@kpmg.com.my

Mauritius
Wasoudeo Balloo
+230 406 9891
wballoo@kpmg.com

New Zealand
Paul Dunne
+64 9367 5991
pfdunne@kpmg.co.nz

Philippines
Herminigildo Murakami
+63 2 885 7000 ext. 272
hmurakami@kpmg.com

Singapore
Hong Beng Tay
+65 6213 2565
hongbengtay@kpmg.com.sg

Sri Lanka
Premila Perera
+94 11 2343 106
premilaperera@kpmg.com

Taiwan
Stephen Hsu
+886 2 8101 6666 ext. 01815
stephenhsu@kpmg.com.tw

Thailand
Kullakattimas Benjamas
+66 2 677 2426
benjamas@kpmg.co.th

Vietnam
Jeff Sea
+84 8 3821 9266
jeffsea@kpmg.com.vn

kpmg.com/cn